In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1433

ISAAC J. HURT, PETITIONER

v.

S. J. BRITTON, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Petitioner, convicted by a court-martial in 1955 of rape and murder, challenges the validity of a Presidential order commuting his death sentence to a sentence of forty-five years' imprisonment without possibility of parole. He also contends that in view of pretrial publicity and political pressure to convict, the court-martial violated due process by denying his motion for a change of venue or, alternatively, for the selection of a court-martial board from another command. Finally, he argues that Article 52(a)(2) of the Uniform Code of Military Justice, 10 U.S.C. 852(a)(2), authorizing conviction by concurrence of two-thirds of the court-martial members, violates his consitutional right to a unanimous verdict.

In 1955, petitioner—then a Sergeant in the United States Army, serving at Fort Buckner, Okinawa—was convicted by court-martial of rape and of murder while

perpetrating the rape, in violation of 10 U.S.C. 920 and 918(4). He was sentenced to death.[1] The conviction and sentence were affirmed throughout the military system of review. Pursuant to Article 71(a) of the U.C.M.J. (10 U.S.C. 871(a)), requiring approval of court-martial death sentences by the President and authorizing him to commute the sentence as he sees fit,[2] President Eisenhower commuted petitioner's death sentence in 1960 to confinement at hard labor for a term of forty-five years, upon the express condition that petitioner "never have any rights, privileges, claims or benefits arising under the parole and suspension or remission of sentence laws of the United States * * *" (Pet. App. 1, pp. 11-12).

Petitioner is presently a prisoner at the United States penitentiary at Leavenworth, Kansas. He would be eligible to be considered for parole except for the no-parole clause of his commutation. See 18 U.S.C. 4202; 10 U.S.C. 858(a). In January 1973, he petitioned for a writ of *habeas corpus* in the United States District Court for the District of Kansas, arguing that his conviction was invalid on several grounds and that the no-parole condition on the commutation of his death sentence was unlawful. The district court denied relief in a memorandum opinion and order (Pet. App. 3, pp. 14-19), and the court of appeals affirmed on the reasoning of the district court (Pet. App. 5, pp. 21-22).

---

[1]Under 10 U.S.C. 118, petitioner's crime was punishable by either death or life imprisonment.

[2]Article 71(a) provides:

> No court-martial sentence extending to death or involving a general or flag officer may be executed until approved by the

1. Petitioner contends that under 18 U.S.C. 4202 he is now eligible to be considered for parole and that the no-parole provision of the commutation order is a violation of his right to due process (Pet. 9-10). A similar issue is presented in another case now pending in this Court, *Schick* v. *Reed,* No. 73-5677, in which a serviceman convicted in 1954 of murder and sentenced to death has challenged the validity of a no-parole provision in a Presidential order commuting his sentence to life imprisonment. In that case certiorari was granted on April 22, 1974, to consider the following questions presented by the petition (Schick Pet. 2):

> 1. Whether the no-parole provision contained in the commutation of Petitioner's death sentence is lawful where the underlying death sentence itself is retroactively illegal under *Furman* v. *Georgia,* 408 U.S. 238 (1972), and the only other punishment that could have been imposed at trial was life imprisonment with possibility for parole.
>
> 2. Whether the President, acting under his constitutional power to "grant reprieves and pardons," may lawfully commute a sentence to punishment that is not authorized by law.

Our arguments in support of the lawfulness of the no-parole commutation are set forth in the government's memorandum opposing certiorari in *Schick* v. *Reed*

President. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of the sentence or any part of the sentence, as approved by him, except a death sentence.

and will be elaborated in our brief on the merits.[3] In our view, the present case does not add any significant new dimension to these issues; separate plenary review is therefore unwarranted. Under these circumstances we submit that disposition of petitioner's challenge to the lawfulness of the commutation order be deferred pending this Court's resolution of *Schick* v. *Reed*.

2. Petitioner's other claims are insubstantial and do not warrant further review.

a. Petitioner contends that the law officer's refusal to grant his motion for a change of venue or, alternatively, for the appointment of a court-martial board from a different command, constituted a denial of his right to a fair trial (Pet. 5-7). He argues that the inhabitants of Okinawa were inflamed by the offense in question (the rape and murder of a five-year-old Okinawan girl) and that his Commanding General adopted a policy—which allegedly influenced the court-martial board—of convicting and executing petitioner as a gesture of American goodwill to the local populace. In support of these assertions, petitioner points, *inter alia*, to Okinawan newspaper articles about his case and the records of pre-trial meetings called to discuss several recent rape cases.

We note at the outset that petitioner's claims are not within the scope of appropriate federal review, since they have been "fully and fairly" considered by the

---

[3]We are sending to counsel for petitioner copies of our opposition in *Schick* v. *Reed*. When our merits brief is filed, we will serve a copy on petitioner.

military tribunals. Indeed, in *Burns* v. *Wilson*, 346 U.S. 137, this Court declined on this basis to review the same kinds of claims presented here—including the argument that "the trial was conducted in an atmosphere of 'hysteria' because the crime had been particularly brutal and the authorities had 'created' a demand for vengeance" (346 U.S. at 143). As the district court observed (Pet. App. 3, pp. 17-18), each of petitioner's arguments was "given full and fair consideration at each military level of review." Accordingly, it is not the duty of the civil courts to "re-examine and reweigh each item of evidence" (346 U.S. at 144) relevant to petitioner's claims. See also *Parker* v. *Levy*, No. 73-206, decided June 19, 1974, slip op. pp. 26-27.

In any event, the record does not indicate that pretrial publicity or "command influence" prejudiced the court-martial board. After a full examination of the prospective court-martial members, the defense accepted the panel—a circumstance which suggests that petitioner's allegations of prejudice are insubstantial.[4] See *United States* v. *Moran*, 236 F. 2d 361 (C.A. 2), certiorari denied, 352 U.S. 909; *Allen* v. *United States*, 4 F. 2d 688 (C.A. 7), certiorari denied *sub nom. Hunter* v. *United States*, 267 U.S. 597; *United States* v. *Fairchild*, 435 F. 2d 972 (C.A. 10).

---

[4]Each court-martial member stated during voir dire (Tr. 5-33) that he had consciously avoided reading about and discussing this case. Defense counsel asked each member the following questions:

1. "Do you know if there is an intense feeling among the native population [regarding this case]?"

2. "Have you considered the implications that a finding of not guilty would have on the native population?"

Petitioner's allegations that the court-martial panel was prejudiced by the political atmosphere in Okinawa were thoroughly analyzed by the Court of Military Appeals, which concluded—after an extensive examination of the record (9 U.S.C.M.A. 757-763)—that the denial of petitioner's alternate motions was not an abuse of discretion. We rely here on that discussion by the Court of Military Appeals and note, by way of summary, the court's conclusion (9 U.S.C.M.A. 761-762):

> A reading of the transcripts of the [Ryukyuan-American Community Relations Advisory] Council meeting and the [Commanding General's September 21, 1955] staff conference leaves the conviction that General Moore was not panicked by the civilian community's outrage at the crimes. He shared their abhorrence, as would any normal person. But plainly his abhorrence of the crimes did not result in a determination to convict the accused regardless of the evidence. Rather he insisted that all accused, including the Ryukyuan charged with rape, would be given "a fair and impartial trial." * * *
>
> * * * The record shows that General Moore was concerned with the problems highlighted by these crimes. * * * But it does not show he was

---

3. "If you knew that the convening authority, General Moore, would be faced with complex political problems as a result of an acquittal, would this consciously or unconsciously influence your vote?"

4. "Do you think it will improve relations with the native Okinawans if the accused is found not guilty?"

All of the court members answered the first three questions in the negative and, as to the fourth question, stated that they did not know what effect an acquittal would have on the local populace.

> prejudiced against the accused. It does not show he intended to influence the court-martial which would try the accused or that he desired a conviction or the imposition of a particular punishment as a means of stilling the civilian community's outcry. There is, therefore, no basis for the accused's assertion that, because of his position as Deputy Governor and his statements before his staff and the Advisory Council, General Moore was disqualified from acting in the case. And there is no basis to support the accused's contention that General Moore asserted command influence upon the court-martial.

Similarly, after reviewing the transcript of a press conference held by the Staff Judge Advocate—upon which petitioner also relies to demonstrate "command influence"—the court found "nothing to support the contention that the interview was used as a means of influencing the court-martial which tried the case or that it had that effect" (9 U.S.C.M.A. at 762). And with regard to the allegedly prejudicial press coverage, the court noted further (*id.* at 762-763):

> * * * [W]hatever tension was created in the civilian community was not directed against the accused but against American administration of the Islands. This is not the kind of tension that demanded conviction of the accused by an American court as the sine qua non for its release. Be that as it may, the attitudes of the civilian populace did not affect the court-martial. Several times in the course of his argument defense counsel admitted that the court members "at this time" might not be aware of the feelings of the native population.

Under these circumstances petitioner cannot reasonably argue that his trial was conducted in an atmosphere so

prejudicial as to deprive him of constitutional rights.[5] See *United States* v. *Augenblick*, 393 U.S. 348, 356.

b. Petitioner also contends that his Sixth Amendment right to a unanimous verdict was violated because the concurrence of only two-thirds of the court-martial members was sufficient to convict.[6] This contention is without merit. This Court has long held that servicemen are excluded from the constitutional right

---

[5]*Rideau* v. *Louisiana*, 373 U.S. 723, on which petitioner relies (Pet. 7), is inapposite. There, the Court held that it was "a denial of due process of law to refuse the request for a change of venue, after the people of [the] Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged" (373 U.S. at 726). There, moreover, the people so exposed were those from among whom the jury that tried Rideau was chosen.

[6]Article 52(a)(2) of the U.C.M.J. provides that in cases where the death penalty is not mandatory (as here), a concurrence of two-thirds of the members present is necessary for conviction; Article 52 (b)(1) provides that "[n]o person may be sentenced to suffer death, except by the concurrence of all the court-martial members present * * *." The record of trial in this case does not indicate that the verdict of guilt was in fact not unanimous (Tr. 387-388, 395).

[7]Nor, contrary to petitioner's suggestion (Pet. 10), do the Federal Rules of Criminal Procedure apply to military courts. See Wright, *Federal Practice and Procedure* §872, n. 19.

to trial by jury.[7] See, *e.g.*, *Kahn* v. *Anderson*, 255 U.S. 1, 8; *Ex parte Quirin*, 317 U.S. 1, 40-41; *Whelchel* v. *McDonald*, 340 U.S. 122, 126-127; *O'Callahan* v. *Parker*, 395 U.S. 258, 263; see also *United States* v. *Greene*, 20 U.S.C.M.A. 232; Schiesser, *Trial by Peers: Enlisted Members on Courts-Martial*, 15 Catholic U.L. Rev. 171 (1966); Henderson, *Courts-Martial and the Constitution: the Original Understanding*, 71 Harv. L. Rev. 293(1957).

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.